

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1166 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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UMESH BROTHERS & CO.

Versus

UNION OF INDIA  
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Appearance:

MR SK JHAVERI for Petitioners  
MR M.R. Shah, Additional Central Government  
Standing Counsel, for Respondent No. 1  
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CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 15/09/2000

ORAL JUDGEMENT

1. This appeal has been filed by the  
appellant-original plaintiff against the judgment and  
decree dated April 2, 1979, passed by learned Judge,

Court No.4, City Civil Court, Ahmedabad, in Civil Suit No.459 of 1975. By that judgment and decree, learned Judge dismissed the suit of the appellant on preliminary issue that the suit was barred by Section 69(2) of the Indian Partnership Act, 1941 ('Act' for short).

2. Appellant filed Civil Suit No.459 of 1975 against the respondent for a decree of Rs.13,000/-, being amounts of two demand drafts, namely, (i) demand draft bearing No.326/72 for Rs.5508.69, and (ii) demand draft bearing No.346/72 for Rs.4795.84 - both drawn on Punjab National Bank. The first demand draft was sent by registered post on November 19, 1972, from Manekchowk Post Office, Ahmedabad and the second demand draft was sent by registered post on December 27, 1972 from Railwaypura Post Office, Ahmedabad, to Dhanuram, C/o. Trilokinath Khemchand, Shop No.61, Sabji Mandi, Delhi 7. When the above demand drafts were not received by the said party, enquiry was made by the appellant at the concerned post offices. The Senior Superintendent of Post office, Ahmedabad, informed the appellant on March 13, 1973 that above registered postal articles were fraudulently delivered to some other persons. It is averred in the plaint that Punjab National Bank, Delhi, by its letter dated February 23, 1972, informed the appellant that the amounts of two demands drafts have been realised by clearance through Vijaya Bank Limited. In the plaint, the plaintiff contended that the respondent being statutory carrier, they were responsible for the statutory liability of a bailee. Accordingly, the appellant had served statutory notice under Section 80 of the Code of Civil Procedure ('Code' for short) on August 21, 1973 to the respondent, calling them to pay amounts of two demand drafts and notice charge. As the respondent did not comply with the statutory notice, the appellant had filed the suit to recover the amounts of two demand drafts with 12% interest from December 27, 1972 till the date of filing of the suit.

3. The respondent filed written statement at Exh.9. The respondent mainly contended that the postal officers are exempted from all the responsibilities for loss of articles, etc. under Section 6 of the Indian Post Office Act, 1898. The respondent, further, contended that the suit of the appellant was barred by Section 69(2) of the Act. Hence, the suit is liable to be dismissed.

4. On rival assertions of the parties, the trial court framed issues at Exh.20. The trial court, by order dated February 26, 1979, decided that issue No.1 be heard as preliminary issue, whereupon, the parties had agreed

not to lead any oral evidence. Issue no.1 framed by the trial court reads as under:

"Whether the plaintiff is a firm registered under the Indian Partnership Act and whether the persons suing are or have been shown in the Registrar of Firms as partners of the firm ? if not, what is it's effect ?"

The trial court, after hearing learned counsel for the parties, concluded that, though appellant-firm was registered, the persons suing , i.e. all the partners of the firm, at the time of institution of the suit, were not shown in the Registrar of Firm as partners of the firm and, therefore, the suit was barred by section 69(2) of the Act. On the basis of finding recorded on issue No.1, the trial court had dismissed the suit of the appellant, which has given rise to filing of this appeal.

4. Learned counsel for the appellant, Mr. S.K. Zaveri, and learned Additional Central Government Standing Counsel, Mr.M.R. Shah, have taken us through entire record and proceeding of Civil Suit No.459 of 1975. Learned counsel for the appellant, Mr. S.K. Zaveri, has vehemently submitted that the present suit filed by the appellant was not arising out of contract and, therefore, provision of Section 69(2) of the Act was not attracted. Learned counsel for the appellant further submitted that two demand drafts were fraudulently delivered to some other persons and, therefore, as per the provision of Section 6 of the Act, the appellant was entitled to file suit for damages caused by the respondent due to loss of two demand drafts. Learned counsel for the appellant, Mr. S.K. Zaveri, alternatively, submitted that, even if the Court comes to the conclusion that the suit arises out of contract between the appellant and the respondent, the said contract had come to an end when two demand drafts were delivered to some other persons and, as the postal officers had not discharged their duties, the suit was maintainable under common law and, therefore also, provision of Section 69(2) of the Act was not attracted. Under the circumstance, the suit ought not to have been dismissed by the trial court as barred by Section 69(2) of the Act.

5. Learned Additional Central Government Standing Counsel, Mr.M.R. Shah, has contended that, essentially, the suit was based on breach of contract between the appellant and the respondent and, therefore, provision of Section 69(2) of the Act was clearly attracted and

learned trial judge had committed no error in dismissing the suit of the appellant holding that all the partners suing were not shown in the Registrar of Firms and, therefore, the suit of the appellant was barred by Section 6(2) of the Act.

6. Submission of learned counsel for the appellant that the present suit was not arising out of contract deserves to be accepted. Section 69(2) of the Act reads as under:

69. Effect of non-registration:

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) xx xx xx

(4) xx xx xx "

(Emphasis supplied)

Relying on provision of section 69(2) of the Act, learned counsel for the appellant submitted that the present suit filed by the appellant did not arise from a contract and, therefore, provision of Section 69(2) of the Act was not attracted. In support of the submission, learned counsel for the appellant placed reliance on the decision of the Supreme Court in the case of M/s. Haldiram Bhujawala and another vs. M/s. Anand Kumar Deepak Kumar and another, reported in AIR 2000 Supreme Court p.1287. The facts before the Supreme Court in the above-quoted decision are that: One Ganga Ram alias Haldiram carried on business in the name Haldiram Bhujia Wala since 1941. In 1965, he constituted a partnership with his two sons Moolchand, Shiva Krishnan and his daughter-in-law Kamla Devi, to carry on business under the same name. In December 1972, the said firm applied for registration before the Registrar of Trade Marks for registration of name Haldiram Bhujia Wala, Chand Mal, Ganga Bishan Bhujawala, Bikaner. Accordingly, the Registrar of Trade Marks granted registration with the No.285062. On November 16, 1974, the partnership was dissolved and

under the terms of the dissolution deed the above trade mark fell exclusively to the share of Mool Chand, son of Ganga Bishan. The suit was filed by plaintiff, Mool Chand, son of Ganga Bishan, against infringement of trade-mark and for damages of Rs.6 lakhs, etc. Defendants filed application under Section 7, Rule 11, Code of Civil Procedure, contending that the suit filed by the plaintiff was barred by Section 69(2) of the Partnership Act, 1932. The learned trial judge dismissed the application. The matter was carried to the High Court of Delhi, wherein, the learned single Judge of the Delhi High Court ruled that the right to injunct the defendants in respect of the plaintiffs' Trade Mark was based on principles applicable to a passing off action and the said right was a common law right and did not arise under any contract. Therefore, learned single Judge of the Delhi High Court dismissed the application of the defendants under Order 7 Rule 11 of the Code. Accordingly, it was held that the suit was maintainable and the application of the defendants under Order 7 Rule 11 of the Code was dismissed. The order of learned single Judge was confirmed by the Division Bench of Delhi High Court. The matter was further carried to the Supreme Court, wherein, the Supreme Court, after considering various decisions, in paragraphs 26 and 28, at page 1293, had held as under:

"26. Further section 69(2) is not attracted to any and every contract referred to in the plaint as the source of title to an asset owned by the firm. If the plaint referred to such a contract it could only be as a historical fact. For example, if the plaint filed by the unregistered firm refers to the source of the firm's title to a motor car and states that the plaintiff has purchased and received a Motor Car from a foreign buyer under a contract and that the defendant has unauthorisedly removed it from the plaintiff firm's possession, - it is clear that the relief for possession against defendant in the suit does not arise from any contract with defendant entered into in the course of plaintiff firms' business with defendants but is based on the alleged unauthorised removal of the vehicle from the plaintiff firm's custody by the defendant. In such a situation, the fact that the unregistered firm has purchased the vehicle from somebody else under a contract has absolutely no bearing on the right of the firm to sue the defendant for possession of the vehicle. Such a suit would be maintainable and Section 69(2) would not be a bar, even if the firm is unregistered on the date of suit. The position in the present case is not different.

28. For all the reasons given above, it is clear that the suit is based on infringement of statutory rights under the Trade Marks Act. It is also based upon the common law principles of tort applicable to passing-off actions. The suit is not for enforcement of any rights arising out of a contract entered into by or on behalf of the unregistered firm with third parties in the course of the firm's business transactions. The suit is therefore not barred by Section 69(2)."

7. The appellant had filed Civil Suit No.459 of 1975 for loss of two demand drafts, which the respondent was liable to deliver to the persons to whom they were sent under the provisions of Post Office Act, 1898. Admittedly, those two demand drafts were not delivered to the persons to whom the demand drafts were sent. The plaintiff had based his suit under Section 6 of the Indian Post Office Act, inter alia, alleging that postal officers had delivered the said two articles fraudulently and by their wilful act and default. In my view, the postal authorities were discharging their statutory duty under the Indian Post Office Act, 1898 and the transaction had not arisen out of any contract. The plaintiff had based his case on breach of statutory duty of the respondent. Therefore, in my view, the present case is squarely covered by the decision of the Supreme Court in the case of M/s. Haldiram Bhujawala (supra).

8. Learned Additional Central Government Standing Counsel for the respondent has vehemently submitted that there was contract entered into between the appellant and the respondent when it had sent registered letters along with demand drafts which were delivered to the Post Offices at Ahmedabad and, therefore, it should be held that there was a contract between the appellant and the respondents for delivery of those articles. In my view, this submission of learned Additional Central Government Standing Counsel for the respondent deserves to be rejected. The said two registered letters were sent by the appellant to be delivered at Delhi and the Postal Officers at Delhi had failed to deliver the said articles to the parties to whom they were sent. The plaintiff had suffered loss due to non-delivery of the said articles to the parties to whom they were sent, as the postal officers had misdelivered the said articles fraudulently or by willful act or default to third party. The Postal Officers were discharging their duties under the provisions of the Post Office Act and had failed to discharge their duties by not delivering the said articles to the parties. It cannot be said that the suit was based on any cause of action arising out of a

contract. Therefore, there was clear breach of statutory duty and the plaintiff was entitled to file the suit under common law.

9. It is, alternatively, submitted by learned counsel for the appellant that, even if the Court comes to the conclusion that the suit was based on a contract, even then, as per the decision of the Supreme Court in the case of M/s. Raptakos Brett & Co vs. Ganesh Property, reported in AIR 1998 Supreme Court 3085, when the said articles having been delivered to the wrong persons, the contract had come to an end and the postal officers had committed breach of their statutory duties and, therefore, the suit was maintainable. The facts before the Supreme Court in the case of M/s. Raptakos Brett & Co (supra) were: the respondent-plaintiff was the owner of suit premises consisting of ground floor of a building situated at Marguis Street, Calcutta. The said premises were rented to the appellant-defendant on a monthly rent of Rs.2045/- by a registered lease dated 16th March 1964. This lease was for a period of 21 years commencing from 16th March, 1964, and ending on 15th March, 1985. On the expiry of the said period, the respondent-plaintiff alleging to be a registered partnership firm, filed the aforesaid suit praying for a decree for possession as well as damages @ Rs.200/- per day for illegal occupation of the premises by the appellant-defendant. The defence of the appellant-defendant was that after the expiry of the lease period, it had continued to be a tenant by acceptance of rent by the defendant-landlord and hence it had become a tenant by holding over under Section 116 of the Transfer of Property Act, 1882. Further defence was taken by the appellant-defendant by way of a separate application seeking dismissal of the suit under Order 7, Rule 11(d) of Code of Civil Procedure on the ground that the suit for possession as filed by the plaintiff-respondent, which was an unregistered partnership firm, was not maintainable. Learned trial judge framed relevant issues on the pleadings and came to the conclusion that the defendant-appellant was not a tenant holding over and was in unlawful possession of the premises after the expiry of the lease period. On the question of maintainability of the suit, the trial court held that the suit was not hit by Section 69, sub-section (2) of the Indian Partnership Act, 1932. Accordingly, a decree for possession was passed. The appellant-defendant carried the matter in first appeal before the High Court. As noted earlier, the learned single Judge who decided the said appeal, held against the appellant-defendant and dismissed the appeal. The

matter was further carried to the Supreme Court. The main contention of the appellant before the Supreme Court was that proper reading of the plaint filed by the respondent was that the respondent sought to enforce right arising out of contract between the parties and as on the date of the suit, the respondent-firm was not a registered partnership firm and the suit was, ex-facie, not maintainable and was required to be dismissed as per Section 69(2) of the Act. The Supreme Court rejected the contention raised by the appellant and held in paragraph 23 as under:

"23. The net effect of this discussion, therefore, is that the plaint as framed by the plaintiff-respondent is based on a composite cause of action consisting of two parts, One part refers to the breach of the covenant on the part of the defendant when it failed to deliver vacant possession to the plaintiff-lessor on the expiry of the lease after 15th March 1985 and thereafter all throughout and thus it was guilty of breach of covenants 14 and 17 of the lease. The second part of the cause of action, however, is based on the statutory obligation of the defendant-lessee when it failed to comply with its statutory obligation under Section 108(q) read with Section 111(a) of the Property Act. So far as this second part of the cause of action is concerned, it cannot certainly be said that it is arising out of the erstwhile contract."

Relying upon the principle laid down by the Supreme Court in the case of M/s. Raptakos Brett & Co (supra), learned counsel for the appellant submitted that, even if the suit was arising out of the contract, then also the contract had come to an end when the said articles were wrongly delivered to some other parties by the postal authorities. The appellant was certainly entitled to file suit against the Postal Officers for not discharging their statutory obligation under the provisions of the Indian Post Office Act. Learned counsel for the appellant submitted that the said articles were misdelivered fraudulently to third party, by wilful act or default on the part of the Postal Officers and, therefore, the present suit was not barred by Section 69(2) of the Act. In my view, the submission of learned counsel for the appellant that, even if it is held that there was a contract entered into between the appellant and the respondent for delivery of two postal articles containing two demand drafts, the said contract had come to an end when the said articles were wrongly delivered to some other parties, deserves to be accepted. The contract having come to an end on the delivery of said



two articles to some other parties, the appellant was entitled to file the suit under common law for breach of statutory functions by the postal officers, basing its suit under Section 6 of the Indian Post Office Act by alleging that the Postal Officers had caused damages to the respondent due to misdelivery of the said articles by their fraudulent or wilful act or default. Therefore, in my view, the suit was maintainable because the postal officers had failed to discharge their statutory duties as per the provisions of the Indian Post Office Act.

10. One more submission of learned counsel for the appellant deserves to be appreciated. The said two demand drafts were sent by the appellant on November 19, 1972 and November 27, 1972 respectively. On those two dates, Dahiben was not partner of the firm. She became partner only by virtue of agreement of partnership entered into on November 11, 1974. Therefore, when the cause of action had arisen, Dahiben was not a partner of the appellant-firm. The firm was, admittedly, a registered partnership firm under the provisions of Section 69 of the Partnership Act on the date of filing of the suit and all the partners, except Dahiben Shankerlal, were shown in the Registrar of Firms on the date of filing of the suit. From the averments of the plaint, it becomes clear that cause of action had arisen in November 1972 when Dahiben was not a partner of the appellant-firm. Therefore also, the suit filed by the appellant was not barred by Section 69(2) of the Act.

11. Judging from all the angles, it cannot be said that the suit filed by the appellant was barred by provision of Section 69(2) of the Act and, therefore, in my view, the learned Judge has committed error in dismissing the suit filed by the appellant on preliminary issue that the suit was barred by provision of Section 69(2) of the Act.

12. These were the only submissions raised by learned counsel for both the parties.

13. As a result of foregoing discussion, the appeal is allowed. The judgment and decree dated April 2, 1979, passed by learned Judge, Court No.4, City Civil Court, Ahmedabad, in Civil Suit No.459 of 1975, is quashed and set aside. Civil Suit No.459 of 1975 is remanded to the City Civil Court to be tried on merits in accordance with law. As the suit is of the year 1975, it would be desirable that the same is tried and disposed of as expeditiously as possible. This judgment and order may not be construed as having said anything on the merits of the case. There shall be no order as to costs.

September 15, 2000 (M.H. Kadri, J.)  
(swamy)